Baker Hostetler

Baker&Hostetler LLP

Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304

T 202.861.1500
F 202.861.1783
www.bakerlaw.com

Elliot J. Feldman
direct dial: 202.861.1679
efeldman@bakerlaw.com

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VIA HAND DELIVERY

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: Application of the Countervailing Duty Law to Imports From the People's Republic of China - Request for Comment

Dear Ms. Kuhbach:

We submit these comments in response to the Department of Commerce's ("the Department") *Federal Register* notice, dated December 15, 2006, requesting public comments on the application of the countervailing duty law to imports from the People's Republic of China. We are enclosing, pursuant to the Department's request, one original and eight copies of this submission along with an electronic version on CD-ROM.

Respectfully submitted,

Elliot J. Feldman
John J. Burke
Ronald J. Baumgarten

Attachment

I. INTRODUCTION

The U.S. Department of Commerce ("the Department") currently classifies the People's Republic of China ("PRC") as a non-market economy ("NME") which, under long-standing Department policy, precludes the application of the countervailing duty ("CVD") law to the PRC. Nevertheless, the Department recently initiated a CVD investigation on coated free sheet paper from the PRC and has requested public comments concerning whether it should apply the CVD law to the PRC. *See Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75507 (Dec. 15, 2006). The Department should not apply the CVD law to the PRC unless and until the Department finds that it no longer is appropriate to treat the PRC as an NME under the antidumping law.[1]

The Department's long-standing policy recognizes the linkage between whether a country is an NME for antidumping purposes and whether the CVD law may be applied to imports from that country. There are no valid legal, policy or other reasons to sever that linkage. The basis for finding a country to be an NME under the antidumping law is inconsistent with calculating a subsidy in that same economy. Moreover, U.S. trade law does not provide for the application of the CVD law to NME countries. The U.S. Congress—as the legislative history indicates, and as the Department itself has found—never intended for the CVD law to be applied to NME countries. This conclusion was affirmed by the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir.

[1] These comments take no position on whether the current classification of the PRC reflects economic reality.

1986). Therefore, as long as the Department continues to treat the PRC as an NME for antidumping purposes, it may not apply the CVD law to that country.

II. THE DEPARTMENT CANNOT APPLY THE CVD LAW TO ANY COUNTRY DETERMINED TO BE AN NME BECAUSE THE MEASUREMENT OF THE ALLEGED LEVEL OF SUBSIDIZATION IN AN NME IS NOT POSSIBLE

The antidumping and CVD law contains a single definition of "nonmarket economy country" that applies equally to both antidumping and CVD proceedings. 19 U.S.C. § 1677(18). Thus, as long as the Department continues to treat the PRC as an NME for purposes of its antidumping proceedings,[2] it must also treat it as an NME for purposes of its CVD proceedings. The single statutory definition of "nonmarket economy country" requires the Department to find that a country "does not operate on market principles of cost or pricing structures." *Id.* Such a finding is inconsistent with the application of the CVD law to that country because, without a market, there is no market process that could be distorted by subsidization.

The Department's policy of not applying the CVD law to NMEs originated in *Carbon Steel Wire Rod from Czechoslovakia,* where the Department determined that an NME could not confer a "bounty or grant" within the meaning of section 303 of the Tariff Act, 19 U.S.C. § 1303 (repealed). *See Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19370, 19371 (May 7, 1984). Without a market, the Department cannot determine the misallocation of resources caused by subsidies because there is no market process that could be distorted by subsidization. *See id.* As the Department concluded, "{i}t is

[2] Antidumping law addresses the effects of government control of the economy in an NME country by permitting the use of surrogate market economy country values in calculating normal value. *See* 19 U.S.C. § 1677b(c).

this fundamental distinction—that in an NME system the government does not interfere in the market process, but supplants it—that has led us to conclude that subsidies have no meaning outside the context of a market economy." *Id.*

The CAFC in *Georgetown Steel* affirmed the Department's conclusion that the CVD law is inapplicable to NME countries, viewing as untenable the very idea that a subsidy could exist in an NME. *See Georgetown Steel*, 801 F.2d at 1315.[3] The CAFC observed that the CVD law was intended to protect against unfair competition resulting from subsidies to foreign producers that give them an advantage they otherwise would not have. *See id.* It found that "{i}n exports from a nonmarket economy, however, this kind of 'unfair' competition cannot exist. Although a nonmarket state may engage in foreign trade through a variety of entities, the state controls those entities and determines where, when and what they will sell and at what prices and upon what terms." *Id.* The CAFC correctly understood that in an NME, governments cannot provide a measurable subsidy.

The Department has classified the PRC as an NME since 1981, *see Final Determination at Less than Fair Value: Natural Menthol from the People's Republic of China*, 46 Fed. Reg. 24614 (May 1, 1981), and continues to do so despite the PRC's extensive economic reforms and membership in the World Trade Organization. *See Issues and Decision Memorandum Regarding Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")—China's status as a non-market economy ("NME")*, from Shauna Lee-Alaia et al. to David M.

[3] As the U.S. Government Accountability Office ("GAO") recently observed, the "*Georgetown Steel* ruling raises serious doubt about Commerce's ability {to apply the CVD law to NME countries} without a clear grant of authority from Congress." U.S. Government Accountability Office, *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, June 2005, at 15 ("GAO Report").

Spooner, Aug. 30, 2006. The Department, to be consistent with its long-standing policy and the economic theory underpinning it, should not now attempt to apply the CVD law to the PRC.

Where the Department has determined that a free market does not exist, the Department cannot make comparisons between market-determined prices of a good, and those distorted by the government's involvement in the market.[4] The Department is constrained practically from measuring the alleged benefit to a producer in an NME where the government is considered to have supplanted market forces.[5] Unless and until the Department decides that the PRC is a market economy, any application of the CVD law to the PRC makes no sense practically or economically.

III. U.S. TRADE LAW DOES NOT PROVIDE FOR THE APPLICATION OF THE CVD LAW TO THE PRC AS LONG AS IT IS CLASSIFIED AS AN NME

A. There Is No Legal Authority To Apply The CVD Law To An NME Country

The Department has no explicit legal authority to apply the CVD law to the PRC as long as the Department continues to classify the PRC as an NME pursuant to 19 U.S.C. § 1677(18). U.S. trade law includes provisions for applying antidumping law to NME countries, but no such language exists in the CVD statute. *See* 19 U.S.C. § 1677b(c). The Department, reviewing the legislative history of the trade laws, determined that Congress did not intend for the application of the CVD law to NME

[4] Department officials have acknowledged that, despite economic reforms in the PRC, the "underlying features of the Chinese economy continue to make it difficult to identify appropriate benchmarks for measuring subsidies." GAO Report at 19.

[5] The Department has authority to classify an industry within an NME as a "market-oriented industry" ("MOI") and eligible for treatment as a market economy for purposes of the antidumping law and the CVD law. *See Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China*, 57 Fed. Reg. 24018 (June 5, 1992). This approach is consistent with economic theory—should a sector in an NME country be functioning as a free market, then subsidies caused by government intervention become measurable for an industry operating in that sector. In practice, however, the Department has yet to accept an MOI claim. *See* GAO Report at 14.

countries, *see Carbon Steel Wire Rods from Czechoslovakia*, 49 Fed. Reg. at 19373-74, and the CAFC upheld the Department on appeal. *See Georgetown Steel*, 801 F.2d at 1316-17.

B. Through Many Changes, The Law Has Never Permitted Finding Subsidies In NMEs

When the original CVD statute was adopted in the 1890s, NME countries were non-existent. *See id.* at 1314. Congress has amended the trade laws several times since then, and it has addressed the NME issue consistently through changes to the antidumping law. As the CAFC held, "{t}here is no indication, in any of {the trade} statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply" to NME countries. *Id.* at 1316.

Congress, in the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, amended the antidumping law to address NMEs for the first time. The 1974 Trade Act established a surrogate country methodology for the Department to use in calculating the foreign market value for a good. *See Georgetown Steel*, 801 F.2d at 1316 (citing 19 U.S.C. § 164(c)(1976)(repealed 1979)). The Trade Act of 1974 also included amendments to the CVD law, but there was no indication that Congress intended to change the CVD law as to NME countries. *See id.*

The next substantive revision to the trade law occurred in the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 ("TAA"), where Congress re-enacted the surrogate country antidumping provisions applicable to NME countries. *See Georgetown Steel*, 801 F.2d at 1316-17 (citing 19 U.S.C. § 1677b(c)(1982)). The TAA also implemented into U.S. law the General Agreement on Tariffs and Trade ("GATT") Subsidies Code, which permitted the regulation of imports from state-

controlled economies based on surrogate methods under either the antidumping or the CVD law. *See id.* at 1317. Congress "made various changes in the countervailing duty law," but it "gave no indication that it understood or intended the latter law to apply to nonmarket economies." *Id.* at 1317. Instead, the antidumping law remained the sole means to address NME imports under U.S. trade law, consistent with the GATT Subsidies Code. *See id.* at 1318.

Congress, in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, gave the Department the authority to use the market economy methodology to calculate antidumping duties for industries in NME countries where available data would permit. *See* 19 U.S.C. § 1677b(c)(1)(B).[6] The Department has since interpreted the 1988 amendment of the antidumping law as allowing it to classify an industry in an NME country as "market-oriented" and to apply the CVD law to that industry. *See Oscillating and Ceiling Fans From the PRC*, 57 Fed. Reg. at 24018-19. As the Department concluded, "Congress clearly contemplated a situation in which a sector of an NME may be sufficiently free of NME distortion so that the actual prices and/or costs incurred in the NME could be used in dumping calculations and render meaningful results. If the prices and costs in a sector of an NME are determined to be sufficiently market-oriented to serve as the basis for FMV, it follows that any subsidies would also have meaning and could be fairly identified and quantified." *Id.* at 24019.

The Department determined in *Oscillating and Ceiling Fans From the PRC* that the sector involved was not sufficiently market-oriented to apply the CVD law.

[6] The 1988 Act made changes to the CVD law, but these changes did not involve the NME issue.

See id. at 24018-19. The most important aspect of that case is the Department's reaffirmation of the linkage between NME treatment under the antidumping law and application of the CVD law.

Congress made further changes to the CVD law in the Uruguay Round Agreements Act ("URAA") of 1994, Pub. L. No. 103-465, 108 Stat. 4809, but again did not adopt any amendments concerning the applicability of the CVD law to NME countries. The Statement of Administrative Action ("SAA") accompanying the URAA even noted that *Georgetown Steel* represented the "reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries." URAA SAA, H.R. Doc. 103-316, 103d Cong., 2d Sess., at 256.[7] This language indicates that both the Administration and Congress, which approved the SAA, understood that the existing CVD law could not be applied to NME countries.

C. Only Statutory Change Would Permit Finding Subsidies In NMEs

Congress recently acknowledged that it must change the law were the Department to have the authority to apply the CVD law to imports from NME countries. In the 109th Congress, for example, the U.S. House of Representatives passed a bill that would have amended the Tariff Act of 1930 to authorize the imposition of countervailing duties on NME country imports. *See* H.R. 3283, 109th Cong. (2005).[8] Representatives Phil English (R-Pa.) and Ben Cardin (D-Md.), during floor debate on the measure, recognized that the current law did not allow for the application of the

[7] The SAA represented the definitive views of the Administration on the URAA, and was endorsed by Congress when it passed the URAA. *See* 19 U.S.C. § 3511(a)(2).

[8] A companion version in the Senate, S. 1421, would have made the same change. *See* S. 1421, 109th Cong. (2005). H.R. 3283 ultimately died in the Senate.

CVD law to NME countries such as the PRC. *See* Cong. Rec. H-6849 (daily ed. July 27, 2005).

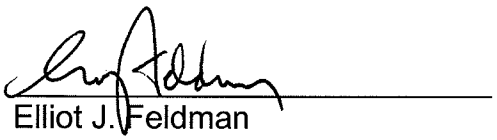
The last three decades of legislative history affirm that Congress intended NME country imports to be handled through the antidumping law—not the CVD law—and leave little doubt that the application of the CVD law to NME countries by the Department likely would be found unlawful. As the CAFC noted, should antidumping law be "inadequate" to deal with NME imports, "it is up to Congress to provide any additional remedies it deems appropriate." *Georgetown Steel*, 801 F.2d at 1318. The Department cannot apply the CVD law to the PRC unless and until the Department determines that the PRC is no longer an NME for purposes of both the antidumping law and the CVD law.

IV. CONCLUSION

The Department cannot apply the CVD law to the PRC as long as it is considered an NME. The existence of subsidies in an NME does not accord with economic theory, and the Department realistically cannot measure them. Only were the PRC to be classified as a market economy would measurement of alleged subsidies make any economic sense. More importantly, as the CAFC affirmed in *Georgetown Steel*, Congress never intended for the Department to apply the CVD law to NME countries. The Department should preserve its current approach of not

applying the CVD law to the PRC for as long as it deems the PRC to be an NME country.

Respectfully submitted,



Elliot J. Feldman
John J. Burke
Ronald J. Baumgarten
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036-5304
Tel: 202-861-1679